

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff/  
Respondent,

vs.

ULISES BECERRIL-HUATO,

Defendant/  
Petitioner.

No. CR-F-02-5288 OWW

MEMORANDUM DECISION AND  
ORDER DENYING PETITIONER  
ULISES BECERRIL-HUATO'S  
MOTION FOR LEAVE TO FILE  
PETITION FOR WRIT OF HABEAS  
CORPUS

On December 29, 2008, Petitioner Ulises Becerril-Huato filed  
a motion for leave to file a petition for writ of habeas corpus.

Petitioner contends that his defense attorney, David Balakian,  
failed to file a Notice of Appeal when asked to do so and the  
Court had given Petitioner the right to file a Notice of Appeal.

Petitioner pleaded guilty pursuant to a written Plea  
Agreement before the Honorable Robert E. Coyle on December 20,  
2004. Petitioner was sentenced on February 28, 2005 to 144  
months incarceration.

1 Because Petitioner is a federal prisoner seeking to assert a  
2 post-conviction challenge to the legality of his conviction and  
3 sentence, he must file a motion to vacate, set aside or correct  
4 sentence pursuant to 28 U.S.C. § 2255. A federal prisoner may  
5 not attack his conviction and sentence by way of a habeas corpus  
6 petition under Section 2241 unless a motion under Section 2255 is  
7 "inadequate or ineffective to test the legality of his  
8 detention." 28 U.S.C. § 2255; *see also Moore v. Reno*, 185 F.3d  
9 1054, 1055 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1178 (2000).  
10 A federal habeas petitioner may not avoid the limitations imposed  
11 on successive Section 2255 motions by styling his petition as one  
12 pursuant to Section 2241 rather than Section 2255. *Id.*

13 Section 2255 provides that a one-year period of limitation  
14 applies to a Section 2255 motion, which limitation period runs  
15 from the latest of:

16 (1) the date on which the judgment of  
17 conviction became final;

18 (2) the date on which the impediment to  
19 making a motion created by governmental  
20 action in violation of the Constitution or  
21 laws of the United States is removed, if the  
22 movant was prevented from making a motion by  
23 such governmental action;

24 (3) the date on which the right asserted was  
25 initially recognized by the Supreme Court, if  
26 that right has been newly recognized by the  
Supreme Court and made retroactively  
applicable to cases on collateral review; or

(4) the date on which the facts supporting  
the claim or claims presented could have been  
discovered through the exercise of due  
diligence.

1 In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme  
2 Court addressed the showings required for a claim of ineffective  
3 assistance of counsel because of counsel's failure to file a  
4 notice of appeal. The Supreme Court noted that it has "long held  
5 that a lawyer who disregards specific instructions from the  
6 defendant to file a notice of appeal acts in a manner that is  
7 professionally unreasonable." *Id.* at 477.

8 The threshold issue is the timeliness of this claim for  
9 relief. Applicable here is Section 2255(4).

10 Assuming the truth of Petitioner's assertion that he asked  
11 Mr. Balakian to file a notice of appeal on February 28, 2005,  
12 Petitioner's motion was not filed until December 29, 2008, almost  
13 four years later. Petitioner makes no showing that he exercised  
14 any diligence in checking the status of his appeal. Petitioner  
15 does not assert when he first inquired into the status of his  
16 appeal or whether he ever inquired about the status of his  
17 appeal.

18 "The statute does not require the maximum feasible  
19 diligence, only due, or reasonable diligence." *Wims v. United*  
20 *States*, 225 F.3d 186, 190 n.4 (2<sup>nd</sup> Cir.2000). "Due diligence ...  
21 does not require a prisoner to undertake repeated exercises in  
22 futility or to exhaust every imaginable option, but rather to  
23 make reasonable efforts." *Aron v. United States*, 291 F.3d 708,  
24 712 (11<sup>th</sup> Cir.2002). This test requires courts to consider  
25 certain external requirements such as "the conditions of [the  
26 petitioner's] confinement." *Wims, id.* Because "a defendant who

1 instructs counsel to initiate an appeal reasonably relies upon  
 2 counsel to file the necessary notice," *Roe v. Flores-Ortega*,  
 3 *supra*, 528 U.S. at 476, a petitioner is not required "to check up  
 4 on his counsel's pursuit of an appeal on ... the very day on  
 5 which [his] conviction becomes final." *Wims, id.* However, "a  
 6 duly diligent person" does not require "three and a half years  
 7 ... to discover that counsel had not filed a notice of appeal  
 8 ...." *Zapata v. United States*, 2000 WL 1610801 at \*3  
 9 (S.D.N.Y.2000); see *Tineo v. United States*, 2002 WL 1997801 at \*2  
 10 (S.D.N.Y.2002) ("A duly diligent person in Tineo's shoes would not  
 11 have needed more than three years to discover the alleged  
 12 ineffectiveness of counsel, including whether his attorney had  
 13 failed to file a direct appeal."); *Gonzalez v. United States*,  
 14 2002 WL 31512728 at \*4 (S.D.N.Y.2002).

15 Petitioner's claim of ineffective assistance of counsel is  
 16 time-barred pursuant to Section 2255(4).

17 In *Calderon v. U.S. Dist. Court for Central Dist. of Cal.*,  
 18 128 F.3d 1283 (9<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1099 and  
 19 523 U.S. 1061 (1998), *overruled on other grounds*, 163 F.3d 530  
 20 (9<sup>th</sup> Cir. 1998), the Ninth Circuit held that the one-year  
 21 limitations period applicable to Section 2255 motions is subject  
 22 to equitable tolling. However, the Ninth Circuit further held:

23 Equitable tolling will not be available in  
 24 most cases, as extensions of time will only  
 25 be granted if 'extraordinary circumstances'  
 26 beyond a petitioner's control make it  
 impossible to file a petition on time ... We  
 have no doubt that district judges will take  
 seriously Congress's desire to accelerate the

1 federal habeas process, and will only  
2 authorize extensions when this high hurdle is  
surmounted.

3 *Id.* at 1288-1289.

4 Petitioner makes no showing that anything prevented him from  
5 filing the instant motion until almost four years after  
6 Petitioner was sentenced.

7 For the reasons stated, Petitioner's motion for leave to  
8 file a petition for writ of habeas corpus is DENIED.

9 IT IS SO ORDERED.

10 Dated: December 31, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE